UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA FEATHERSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-41-P-H***
	)	
DAVRIC CORPORATION, INC., et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

The plaintiff, Lisa Featherson, has moved to amend the complaint, which she has already amended once in this action, to change the name of the corporate defendant and to add two paragraphs of factual allegations. Docket No. 10. The defendants do not object to the change in the name of the corporate defendant but do object to the added allegations on the grounds that the amendment would be futile as to those allegations, that adding those allegations would prejudice defendant Ricci, and that an alternate forum, specifically state court, exists for any claims against defendant Ricci that might be supported by the added allegations. Defendants' Objection to Motion to Amend Complaint ("Objection") (Docket No. 15) at 2-4.

Futility of a proposed amendment to a complaint is a recognized basis for denial of leave to amend. A proposed amendment is futile when it fails to state a claim upon which relief may be granted. *Dempsey v. National Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988). Here, the defendants argue that the statement alleged to have been made by Ricci in one of the proposed additional

paragraphs "is so obviously a tongue-in-cheek comment that it could not possibly have been defamatory." Objection at 3. This contention is governed by the standards for defamation actions set forth in *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997). In that case, the First Circuit held that "the First Amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts," *id*. at 128, and noted further that

> [c]ertain excesses of language cannot ground a defamation claim because, in context, those excesses involve only puffery or epithets, and thus are insufficiently fact-based. These turns of phrase are recognized rhetorical devices; they are not actionable because they are commonly understood, in context, as imaginative expressions rather than statements of fact.
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> The determination of whether a statement is hyperbole depends primarily upon whether a reasonable person could interpret the statement to provided actual facts about the individual or institution it describes.

Id. at 130-31.

Here, it is not possible to conclude that no reasonable person would believe the alleged statement to have presented facts about the plaintiff. The question for the court at the time of amendment of the complaint differs significantly from that presented on a motion for summary judgment, when the factual context surrounding the alleged statement will also be before the court. For purposes of a motion to dismiss, however, the proposed amendment does state a claim upon which relief could be granted.

The defendants' contention that Ricci would be prejudiced by the addition of the two new paragraphs is based solely on the assertion that "it would serve only to prolong his improper joinder as a party to this federal action." Objection at 4. If the additional material states a claim against Ricci upon which relief could be granted, as I have already concluded, there is no cognizable prejudice resulting from his remaining a party to this action. Nor does the fact that such a claim

could also be brought in state court require its dismissal in this action. *See, e.g., Yeager v. Norwest Multifamily, Inc.*, 865 F. Supp. 768, 771-72 (M.D. Ala. 1994) (district court may continue to assert jurisdiction over state law tort claim against corporate defendant's employee after federal charges against him dismissed if alleged tort is part of same case or controversy as claims against employer). The proposed amendment is not futile for either of these reasons.

The defendants' final argument is that the proposed amendment fails to state a claim upon which relief may be granted because Ricci is immune from suit pursuant to the exclusive liability provision of the Maine Workers' Compensation Act, 39 M.R.S.A. § 104. They rely on *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29 (D. Me. 1995). However, Judge Brody made clear in that case that dismissal on this basis is only possible when it is apparent that the statements at issue concern work-related issues only. *Id*. at 34. Because it is possible that the statements at issue here "may concern issues and incidents outside work-related issues," dismissal would not be appropriate. *Id*. Accordingly, the proposed amendment is not futile.

For the foregoing reasons, the plaintiff's motion to amend the complaint is **GRANTED**.

Dated this 12th day of June, 1998.

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David M. Cohen
United States Magistrate Judge